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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents' principal contention—stated in a heading in respondent NRDC's brief—is that the Commission "exclude[d] * * * from the NEPA decisionmaking process" the "risk of harm to the environment from high-level nuclear waste" (NRDC Br. 23; see *id.* at 30, 32, 33, 36 n.55; NY Br. 15, 22, 25, 26, 29).[1] If respondents mean that the Commission ignored these risks and did not consider whether they should affect reactor licensing, their contention is obviously incorrect. If respondents mean that the Commission, after carefully studying these risks, made a considered decision that for now these risks should not

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[1] "NRDC Br." refers to the brief of respondent Natural Resources Defense Council, Inc. "NY Br." refers to the brief of respondent the State of New York.

affect the decision to issue any particular license, respondents are correct; but they have failed to show that the Commission violated the National Environmental Policy Act of 1969, 42 U.S.C. (& Supp. IV) 4321 *et seq.* (NEPA), or any other statute.

1. It is difficult to see how the Commission could have considered these risks more carefully. The statement of considerations that accompanies Table S-3 explicitly details the uncertainties surrounding the disposal of high-level nuclear wastes. See, *e.g.*, Pet. App. 346a, 347a, 364a-370a. The documents referred to in the table contain more detailed discussions. See Gov't Br. 28-29. Indeed, respondents, in arguing at length that the record shows that there are uncertainties and risks associated with waste disposal,[2] quote the Commission's statement accompanying the table and the documents to which the table specifically refers. See, *e.g.*, NRDC Br. 40-46; NY Br. 20. In this way, respondents refute their own contention that the Commission has ignored these uncertainties, or has not engaged in "clear, candid disclosure and consideration of" these uncertainties (NRDC Br. 23).[3] Similarly, the court of appeals at no point

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[2]These arguments are immaterial to the issue presented in this case; as even the court of appeals appears to have recognized (Pet. App. 35a), the Commission did not purport to find as a fact that the uncertainties at issue here are de minimis.

[3]Respondent NRDC argues briefly (NRDC Br. 31-32) that the rule is defective because the documents discussing the uncertainties are not actually "part of" Table S-3. But the court of appeals did not invalidate (or even question) the rule because of technical difficulties about the extent to which documents were incorporated by reference instead of attached, or because of the absence of summaries of documents incorporated by reference.

Moreover, NRDC cites no legal ground for challenging the rule on this basis. NRDC acknowledges (NRDC Br. 31 & n.48) that CEQ guidelines permit incorporation by reference. NRDC also acknowledges that regulations in force when the rule was issued required only that " '*care* * * * be *taken* to ensure that the statement remains * * *

suggested that the Commission was insufficiently candid or detailed in its examination of the uncertainties associated with waste disposal; the court repeatedly recognized that "the Commission did consider these uncertainties" (Pet. App. 46a; see *id.* at 48a (footnote omitted) ("the NRC, particularly in promulgating the final Rule, has disclosed the nature of many of the uncertainties surrounding the storage of long-lived wastes"); *id.* at 27a, 35a n.97, 41a).

Respondents do not appear to contest our showing (Gov't Br. 26-29) that this discusssion of uncertainties satisfies the terms of Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C). The Commission's discussion is surely "detailed"; as we said, neither respondents nor the court of appeals suggests that the Commission was insufficiently candid or thorough in its discussion of these issues. The Commission's account is also given by "the responsible official"; it concerns "the environmental impact of the proposed action"; and it is "include[d] in * * * [the] recommendation or report on" the relevant "proposal[]" — an application for a reactor license (see pages 2-3 note 3, *supra*).

Instead, respondents' argument is that because the Commission did not permit individual licensing boards to reconsider the uncertainties in each particular proceeding, the

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essentially self-contained * * *, capable of being understood by the reader without the need for *undue* cross reference.' " NRDC Br. 31-32, quoting 40 C.F.R. 1500.8(b) (1974) (emphasis added). The Commission cannot be said to have violated this flexible regulation. The other regulation cited by NRDC (NRDC Br. 32) was issued after the rule. See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 555 (1978) (review of NEPA compliance is "limited * * * by the time at which the decision was made"). In any event, it seems clear that any interested reader of Table S-3 who sought further elaboration of the value given for transuranic and high-level wastes would have no doubt where to turn.

uncertainties were "excluded from the actual decisionmaking process" (NRDC Br. 32). This implicit equation of the individual proceedings with the "actual decisionmaking process" shows why we consider respondents' position, and the court of appeals' decision, to be inconsistent with the principle that NEPA may be satisfied by adopting a generic rule. Plainly the *Commission* considered the effect that the uncertainties should have on licensing decisions; its consideration was fully explicit in the Statement of Considerations accompanying the table. *E.g.*, Pet. App. 368a-369a. The Commission decided that, notwithstanding the uncertainties, individual licensing decisions should be based "on the assumption * * * that bedded-salt repository sites can be found which will provide effective isolation of radioactive waste from the biosphere" (*id.* at 369a). Respondents may believe that this was an unwise decision, and that the assumption is faulty; but that does not mean that the uncertainties were not meaningfully considered.

Oddly, NRDC's principal argument for the proposition that the Commission's way of proceeding was inconsistent with NEPA appears to be that the Commission has undermined NEPA's goal of "ensuring that the agency is politically accountable for its environmental decisionmaking" (NRDC Br. 30). We agree that enhancing political accountability is an important goal of NEPA. But the Commission's position on the significance of the uncertainties of nuclear waste disposal was developed, announced, and implemented in precisely the way that would *maximize* the political visibility of that position.

The alternatives to the course the Commission followed, as we have explained (Gov't Br. 34-36), were two. The Commission could have instructed licensing boards to use an entirely speculative value, supposedly representing radiation releases from transuranic and high-level waste disposal, that the Commission created by multiplying a number

purporting to reflect the (essentially unknowable) probability of a release of radiation by the amount of the release. The court of appeals appears to have endorsed this approach. See Pet. App. 36a n.100, 44a-45a. Alternatively, the Commission could simply have described the uncertainties, drawn no conclusion, and allowed the licensing boards deciding individual applications to consider those uncertainties as they wished; NRDC appears to endorse this approach (NRDC Br. 36). Either alternative, of course, would have resulted not in a single, clear, visible decision by the Commission on a matter of considerable environmental signficance but in a welter of possibly inconsistent and far less visible decisions in particular cases.

2. Respondents, like the court of appeals, also repeatedly contend that the Commission erred by not allowing the uncertainties to affect the licensing boards' decisions in particular cases — specifically, "close" licensing decisions that are otherwise in "equipoise." See, *e.g.*, NRDC Br. 33-35, 50; NY Br. 27, 29, 30. As we explained in our opening brief (Gov't Br. 33-35), the notion that licensing decisions are made in such a quasi-mathematical way is unrealistic; for example, Commissioner Gilinsky, on whose statement respondents rely (*e.g.*, NRDC Br. 16), described this view as "naive" and dismissed the possibility of "equipoise" cases. Pet. App. 388a & n.1. But even assuming that there is a meaningful sense in which the Commission excluded an element that the licensing boards would otherwise have "factored into" particular decisions, it emphatically does not follow that NEPA has been violated.

Once an agency has fully examined the environmental consequences of its actions, NEPA leaves it free to make any substantive decision. An agency need not give a higher priority to averting environmental damage than to any other objective. See, *e.g.*, *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 444 U.S. 223, 227-228 (1980);

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519, 558 (1978); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976). Indeed, in principle NEPA itself does not prevent an agency from, in effect, assigning a value of zero to a particular environmental harm or benefit, at least so long as it has carefully considered that harm or benefit and its action is not arbitrary or capricious.

The Commission did not attach a zero value to the uncertainties at issue here. The Commission did decide, however, that for now, pending further developments and further generic consideration of the problem by the Commission, those uncertainties are not to be considered by licensing boards deciding individual license applications. Nothing in NEPA prohibits the Commission from dealing with a category of environmental risks and consequences in this way, at least if those risks or consequences can reasonably be dealt with on a generic basis — something neither respondents nor the court of appeals denies is true of the uncertainties at issue here. NEPA requires an agency fully to consider and disclose the significant environmental consequences of its proposed actions early in its decisionmaking; but once an agency does so, NEPA does not prevent it from making a reasonable decision to "factor" those consequences into its decisions only in a certain fashion or at a certain level of the decisionmaking process.

Of course, an agency's determination to consider a particular category of risks or consequences in a certain way cannot be arbitrary or capricious, or made for no reason at all. See 5 U.S.C. 706(2)(A). But neither respondents nor the court of appeals suggests that the Commission had no reason for concluding that licensing boards deciding individual applications are not the appropriate forum for considering these uncertainties. While the court of appeals formally ruled that the Commission's action was arbitrary and capricious, it made it clear that this ruling was based solely on its

construction of NEPA (see Pet. App. 29a) — specifically, on its conclusion that NEPA required the uncertainties to be considered by the licensing boards, no matter what the Commission considered to be the proper allocation of responsibilities (see, *e.g.*, Pet. App. 44a). Similarly, respondents' arguments that the uncertainties must be considered at the licensing board level, and not just the Commission level, are based entirely on NEPA. See, *e.g.*, NRDC Br. 32-33, 35-37.

In fact, the Commission had ample reason to exclude consideration of these uncertainties from the province of the licensing boards. First, considering these uncertainties is, as we explained in our principal brief (Gov't Br. 35-36), a time-consuming, burdensome process, and the imponderable nature of the uncertainties makes it most difficult for a board deciding a particular application to take them into account in a meaningful way. As respondents appear to recognize, the uncertainties in this area resist quantification, and a licensing board attempting to weigh these uncertainties against, for example, the economic benefits of a particular reactor, would necessarily be engaged in a highly speculative and subjective task.[4]

Second, excluding the consideration of uncertainties from individual proceedings is unlikely to have a significant impact on the environment. To begin with, there is a necessary limitation on how substantial these uncertainties can be. As we noted in our opening brief (Gov't Br. 9-10 n.9), the Commission has determined that unless it has " 'reasonable

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[4]Respondents assert (*e.g.*, NRDC Br. 30, 37) that assessing the risks of accidents at the reactor, which licensing boards are empowered to do, also involves a necessarily speculative judgment. But in such instances the board knows and must consider the nature of the area and population that might be affected; this is not possible for the impacts from waste disposal, which are entirely generic, not specific to any reactor.

[assurance] that * * * wastes [will] * * * in due course be disposed of safely,' " it will not license reactors at all. Another rulemaking proceeding is now being conducted to reexamine that issue. See *id.* at 12-13 n.12, 44.

Moreover, both the court of appeals and respondents appear to agree that the Commission could properly assign the uncertainties a value so low that it would make a difference only in "close" cases. See, *e.g.* NRDC Br. 33-35, 50; NY Br. 27, 29, 30. But there will, in all probability, be few of these cases.[5] Even if some "equipoise" cases would be decided differently were the licensing boards able to consider the uncertainties associated with waste disposal, the overall problem of nuclear waste disposal would remain and its magnitude would hardly be diminished. The Commission could reasonably decide that the fundamental issue is whether the risks associated with nuclear waste disposal are small enough to permit the continued construction of nuclear power plants at all, and that however this issue is resolved it makes little sense to attempt to weigh the risks again in each individual proceeding.

For these reasons, the Commission's decision to exclude the uncertainties at issue here from the "calculus" performed by individual licensing boards was not arbitrary; it was a reasonable effort to spare them a cumbersome inquiry that — given the fundamental nature of the uncertainties —is most difficult to perform in a uniform, objective, or

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[5]Respondent NRDC asserts (NRDC Br. 34) that because a number of proposed nuclear plants have been cancelled since Table S-3 was adopted, there is reason to believe that many applications have a "quite marginal" cost-benefit balance. But of course a variety of non-environmental considerations — principally economic — are at issue in deciding whether to build a plant; the fact that such economic decisions reflect a close balance does not in any way suggest that the Commission's environmental decision on a license application reflects such a balance.

meaningful fashion, and that is unlikely to have a significant effect on individual licensing decisions or on the overall problem of nuclear waste disposal. Having fully explored the uncertainties at or before the beginning of the licensing process, the Commission satisfied NEPA; NEPA did not also require the Commission to take the uncertainties into account in a particular way or at another stage of the licensing process as well.

3. In our opening brief (Gov't Br. 48), we pointed out that in deciding that the original and interim versions of the rule did not permit consideration of the health, socioeconomic, and cumulative effects of the releases described in the rule, the court of appeals failed to cite a single proceeding in which evidence of such effects was excluded. Instead, the court relied entirely on the language of the rule, which is ambiguous at worst. In their discussion of this issue, respondents similarly do not cite a single case in support of their claim; they also do not show that the language of the rule was other than ambiguous.

4. Finally, we note that respondents discuss the general problems of nuclear waste disposal at some length. See, *e.g.*, NRDC Br. 3-7. The Commission fully agrees that this is an issue of great complexity and importance, and that it is in many important respects unresolved. But there is a significant disparity between respondents' general discussions of the problem and their specific legal position. NRDC, for example, urges only that the Commission rearrange the documents describing the uncertainties and permit them to be considered by licensing boards "in close cases" (NRDC Br. 50). In many (or even all) of those few cases, of course, licenses might be granted nonetheless. And the denial of a handful of licenses — on the basis of a particular board's subjective assessment of essentially imponderable uncertainties — is not only not required by NEPA; it is not an

effective response to the problem of nuclear waste disposal. The Commission and Congress will continue to address this important problem, but the measure suggested by respondents and the court of appeals is simply not a useful step toward a solution.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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